

Oregon

Tina Kotek, Governor

Department of Environmental Quality
Office of Compliance and Enforcement
700 NE Multnomah Street, Suite 600
Portland, OR 97232-4100
(503) 229-5696
FAX (503) 229-5100
TTY 711

December 5, 2023

CERTIFIED MAIL: 7014 2120 0001 8302 9729

H5 Fund IV LLC
c/o Paracorp Incorporated, Registered Agent
7185 SW Sandburg Street, Suite 100
Portland, OR 97223

Re: Notice of Civil Penalty Assessment and Order
Case No. AQ-ACDP-NWR-2023-061

This letter is to inform you that the Oregon Department of Environmental Quality (DEQ) has issued you a civil penalty of \$3,000 for operating an electrical power generator at your data center facility at 1233 NW 12th Avenue in Portland, Oregon without a valid Air Contaminant Discharge Permit (ACDP) from DEQ. The violation occurred when you failed to timely transfer permit coverage or apply for a new permit after you purchased the data center from another company.

DEQ issued this penalty because operating your generator without an ACDP is a serious violation of Oregon law. ACDPs include emission limits, monitoring, and reporting requirements to ensure that emissions generating equipment do not emit air contaminants at levels that may harm public health and the environment. Diesel generators emit relatively high levels of nitrogen oxides, carbon monoxide and particulate matter and sulfur, all air pollutants that, when emitted in excess, can negatively impact health and the environment.

DEQ appreciates your efforts to correct the violation by submitting a complete ACDP application in June 2023. DEQ considered these efforts when determining the amount of civil penalty.

If you wish to appeal this matter, DEQ must receive a request for a hearing within 20 calendar days from your receipt of this letter. The hearing request must be in writing. Send your request to DEQ Office of Compliance and Enforcement:

Via mail – 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232

Via email – DEQappeals@deq.oregon.gov

Via fax – 503-229-6762

Once DEQ receives your request, we will arrange to meet with you to discuss this matter. If DEQ does not receive a timely written hearing request, the penalty will become due. Alternatively, you can pay the penalty by sending a check or money order to the above address.

The attached Notice further details DEQ's reasons for issuing the penalty and provides further instructions for appealing the penalty. Please review and refer to it when discussing this case with DEQ.

DEQ may allow you to resolve part of your penalty through the completion of a Supplemental Environmental Project (SEP). SEPs are environmental improvement projects that you sponsor instead of paying a portion of the penalty. Further information is available by calling the number below or at <http://www.oregon.gov/deq/Regulations/Pages/SEP.aspx>.

DEQ's rules are available at <http://www.oregon.gov/deq/Regulations/Pages/Statutes.aspx> or by calling the number below.

If you have any questions, please contact Becka Puskas at 503-229-5058 or becka.puskas@deq.oregon.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kieran O'Donnell', written in a cursive style.

Kieran O'Donnell, Manager
Office of Compliance and Enforcement

Enclosures

cc: Larry Scharp, H5 Fund IV LLC, 1233 NW 12th Street, Portland, OR 97209
Elaine Go, DEQ
Josh Alexander, DEQ
Accounting, DEQ
Donald Hendrix, AQ, DEQ

1 BEFORE THE ENVIRONMENTAL QUALITY COMMISSION

2 OF THE STATE OF OREGON

3 IN THE MATTER OF:
4 H5 Fund IV LLC,

5 Respondent.

) NOTICE OF CIVIL PENALTY
) ASSESSMENT AND ORDER

) CASE NO. AQ-ACDP-NWR-2023-061

6 I. AUTHORITY

7 The Department of Environmental Quality (DEQ) issues this Notice of Civil Penalty Assessment
8 and Order (Notice) pursuant to Oregon Revised Statutes (ORS) 468.100, ORS 468.126 through 468.140,
9 ORS Chapters 183 and 468A and Oregon Administrative Rules (OAR) Chapter 340, Divisions 011, 012,
10 200 and 216.

11 II. FINDINGS OF FACT

12 1. Since on or about January 31, 2021, Respondent has owned an operated a data center at
13 1233 NW 12th Avenue in Portland, Oregon (the Facility).

14 2. The Facility has a 3,673 horsepower diesel-fired dispatchable electric power generator
15 with a rated capacity of 2,000 kilowatts (kW).

16 3. Pursuant to OAR 340-216-0020(3), no person may construct, install, establish or operate
17 any air contaminant source listed in OAR 340-216-8010 without first obtaining an Air Contaminant
18 Discharge Permit (ACDP) from DEQ (except for operations in Lane County) or Lane Regional Air
19 Protection Agency (operations in Land County). No person may continue to operate an air contaminant
20 source if the ACDP expires, or is terminated, denied, or revoked; except as provided in OAR 216-0082,
21 which requires that the owner or operator submit either a timely and complete permit application for
22 renewal or an application for a different type of permit that authorizes operation of the air contaminant
23 source.

24 4. OAR 340-216-8010, Table 1, Part B, source category #27 requires an ACDP for
25 facilities that conduct electric power generation from combustion, excluding units used exclusively as
26 emergency generators and units less than 500 kW.

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1 5. The dispatchable electrical power generator at the Facility is not used exclusively as an
2 emergency generator.

3 6. In 2011, DEQ issued General ACDP AQGP-018 (the 2011 Permit) for qualifying
4 facilities that conduct electrical power generation.

5 7. The 2011 Permit requires permit registrants to notify DEQ of a legal name change or
6 new ownership of a facility within 60 days of the change by submitting a "Permit Application Form" to
7 DEQ (Condition 8.7).

8 8. On August 25, 2011, DEQ assigned the Facility, then operated by vXchnge Facilities,
9 LLC, to the 2011 Permit as source no. 26-0132 (permit no. 26-0132-18-01).

10 9. Condition 9.1 of the 2011 Permit requires registrants to submit a complete application
11 for reassignment to the AQGP-018 within 60 days of the permit being reissued by DEQ.

12 10. On or about January 31, 2021, Respondent's parent company, H5 Data Centers,
13 purchased seven data centers, including the Facility, from vXchnge Facilities, LLC.

14 11. On July 30, 2021, vXchnge Facilities, LLC submitted an AQGP-018 renewal application
15 to DEQ.

16 12. On December 20, 2021, the limited liability company H5 Fund IV LLC (Respondent)
17 was formed, and on June 10, 2022, Respondent submitted the LLC's application for authority to transact
18 business in Oregon to the Oregon Secretary of State.

19 13. On March 4, 2022, vXchnge Facilities, LLC withdrew its authority to transact business
20 in the state of Oregon.

21 14. On April 15, 2022, DEQ renewed and reissued AQGP-018 (the 2022 Permit).

22 15. Like the 2011 Permit, the 2022 Permit requires permit registrants to notify DEQ of a
23 legal name change or new ownership of a facility within 60 days of the change by submitting a "Permit
24 Application Form" to DEQ (Condition 8.8).

25 16. As of September 28, 2022, neither vXchnge Facilities, LLC or Respondent had notified
26 DEQ of a legal name change or new ownership, and neither vXchnge Facilities, LLC or Respondent
27 had amended the AQGP-018 renewal application on file with DEQ.

1 17. On September 28, 2022, DEQ reassigned the vXchnge Facilities, LLC coverage under
2 the 2022 Permit for the Facility as source no. 26-0132.

3 18. On October 18, 2022, DEQ sent vXchnge Facilities, LLC a follow up letter to the
4 Facility address in Portland, Oregon.

5 19. On October 20, 2022, a representative of vXchnge notified DEQ by telephone that the
6 Facility had been sold to H5 Data Centers. That same day, DEQ provided permit transfer information
7 including a transfer application form to H5 Data Centers via email. The transfer application form must
8 be signed by the current permit holder and the future permit holder.

9 20. As of February 1, 2023, DEQ had not received a complete permit transfer application
10 from Respondent. DEQ notified Respondent via email that the Facility no longer qualified to transfer
11 coverage under the 2022 Permit because vXchnge Facilities LLC withdrew its authority to transact
12 business in Oregon on March 4, 2022, and as of February 1, 2023, DEQ had not received a permit
13 transfer application signed by both parties.

14 21. On February 17, 2023, DEQ notified Respondent in writing that the Facility's
15 assignment to the 2022 Permit (permit no 26-0132-18-01 assigned to vXchnge Facilities, LLC) was
16 cancelled.

17 22. On June 21, 2023, Respondent submitted to DEQ a complete AQGP-018 permit
18 application, including a City of Portland Land Use Compatibility Statement (LUCS).

19 23. On August 11, 2023, DEQ assigned Respondent coverage under the 2022 Permit for the
20 Facility under a new source no. 26-0479 (permit no. 26-0479-18-01).

21 III. CONCLUSIONS

22 1. From at least February 17, 2023 to August 11, 2023, Respondent violated ORS
23 468A.045(1)(b) and OAR 340-216-0020(3) by operating an air contaminant source listed in OAR 340-
24 216-8010, Part B, source category #27 (electrical power generators) without first obtaining an ACDP
25 from DEQ, as described in Section II, paragraphs 1-23 above. Specifically, Respondent failed to timely
26 transfer permit coverage for the Facility from vXchnge Facilities, LLC to Respondent within 60 days of
27 a sale or name change as required under Condition 8.8 of the 2022 Permit (Condition 8.7 of the 2011

1 Permit), despite the fact that Respondent's parent company purchased the Facility from vXchnge in
2 January 2021, Respondent formed its LLC in December 2021, and vXchnge withdrew its authorization
3 to conduct business in Oregon on March 4, 2022. According to Condition 8.8 of the 2022 Permit (and
4 Condition 8.7 of the 2011 Permit) Respondent should have applied to transfer permit coverage, or
5 applied for a new permit, at the latest, within 60 days of March 4, 2022. DEQ notified Respondent that
6 permit coverage was cancelled on February 17, 2023. This is a Class II violation according to OAR 340-
7 012-0054(2)(a). DEQ hereby assesses a \$3,000 civil penalty for this violation.

8 IV. ORDER TO PAY CIVIL PENALTY

9 Based upon the foregoing FINDINGS OF FACTS AND CONCLUSIONS, Respondent is
10 hereby ORDERED TO:

11 1. Pay a total civil penalty of \$3,000. The determination of the civil penalty is attached as Exhibit
12 1 and is incorporated as part of this Notice.

13 If you do not file a request for hearing as set forth in Section V below, your check or money
14 order must be made payable to "**Department of Environmental Quality**" and sent to the **DEQ,**
15 **Business Office, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232.**

16 V. NOTICE OF RIGHT TO REQUEST A CONTESTED CASE HEARING

17 You have a right to a contested case hearing on this Notice, if you request one in writing. DEQ
18 must receive your request for hearing **within 20 calendar days** from the date you receive this Notice. If
19 you have any affirmative defenses or wish to dispute any allegations of fact in this Notice or attached
20 exhibit, you must do so in your request for hearing, as factual matters not denied will be considered
21 admitted, and failure to raise a defense will be a waiver of the defense. (See OAR 340-011-0530 for
22 further information about requests for hearing.) You must send your request to: **DEQ, Office of**
23 **Compliance and Enforcement, 700 NE Multnomah Street, Suite 600, Portland, Oregon 97232**, fax
24 it to **503-229-6762** or email it to **DEQappeals@deq.oregon.gov**. An administrative law judge
25 employed by the Office of Administrative Hearings will conduct the hearing, according to ORS
26 Chapter 183, OAR Chapter 340, Division 011 and OAR 137-003-0501 to 0700. You have a right to be
27 represented by an attorney at the hearing, however you are not required to be. If you are an individual,

1 you may represent yourself. If you are a corporation, partnership, limited liability company,
2 unincorporated association, trust or government body, you must be represented by an attorney or a duly
3 authorized representative, as set forth in OAR 137-003-0555.

4 Active duty Service members have a right to stay proceedings under the federal Service
5 Members Civil Relief Act. For more information contact the Oregon State Bar at 1-800-
6 452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed
7 Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military
8 Department does not have a toll free telephone number.

9 If you fail to file a timely request for hearing, the Notice will become a final order by default
10 without further action by DEQ, as per OAR 340-011-0535(1). If you do request a hearing but later
11 withdraw your request, fail to attend the hearing or notify DEQ that you will not be attending the
12 hearing, DEQ will issue a final order by default pursuant to OAR 340-011-0535(3). DEQ designates
13 the relevant portions of its files, including information submitted by you, as the record for purposes of
14 proving a prima facie case.

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18 12 / 5 / 2023
19 Date


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Kieran O'Donnell, Manager
Office of Compliance and Enforcement

EXHIBIT 1

FINDINGS AND DETERMINATION OF RESPONDENT'S CIVIL PENALTY PURSUANT TO OREGON ADMINISTRATIVE RULE (OAR) 340-012-0045

VIOLATION NO. 1 Operating an air contaminant source listed in OAR 340-216-8010, Part B, source category #27 (electrical power generators) without first obtaining an ACDP from DEQ, in violation of ORS 468A.045(1)(b) and OAR 340-216-0020(3).

CLASSIFICATION: This is a Class II violation pursuant to OAR 340-012-0054(2)(a).

MAGNITUDE: The magnitude of the violation is moderate pursuant to OAR 340-012-0130(1), as there is no selected magnitude specified in OAR 340-012-0135 applicable to this violation, and the information reasonably available to DEQ does not indicate a minor or major magnitude.

CIVIL PENALTY FORMULA: The formula for determining the amount of penalty of each violation is: $BP + [(0.1 \times BP) \times (P + H + O + M + C)] + EB$

"BP" is the base penalty, which is \$2,000 for a Class II, moderate magnitude violation in the matrix listed in OAR 340-012-0140(3)(b)(B)(ii) and applicable pursuant to OAR 340-012-0140(3)(a)(A) because Respondent has an ACDP.

"P" is whether Respondent has any prior significant actions, as defined in OAR 340-012-0030(19), in the same media as the violation at issue that occurred at a facility owned or operated by the same Respondent, and receives a value of 0 according to OAR 340-012-0145(2)(a)(A), because there are no prior significant actions.

"H" is Respondent's history of correcting prior significant actions, and receives a value of 0 according to OAR 340-012-0145(3)(c) because there is no prior history.

"O" is whether the violation was repeated or ongoing, and receives a value of 4 according to OAR 340-012-0145(4)(d) because there were more than 28 occurrences of the violation. Each day is a separate occurrence of the violation. Respondent operated the Facility without coverage under the AQGP-018 from at least February 17, 2023 to August 11, 2023.

"M" is the mental state of the Respondent, and receives a value of 4 according to OAR 340-012-0145(5)(c) because Respondent's conduct was negligent. According to OAR 340-012-0030(15), negligent means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation. Respondent failed to timely transfer permit coverage for the Facility from vXchnge Facilities, LLC to Respondent within 60 days of a sale or name change as required under Condition 8.8 of the 2022 Permit (Condition 8.7 of the 2011 Permit), despite the fact that Respondent's parent company purchased the Facility from vXchnge Facilities, LC in January 2021,

Respondent formed its LLC in December 2021, and vXchnge Facilities, LLC withdrew its authorization to conduct business in Oregon on March 4, 2022. In October 2022, a representative of vXchnge Facilities, LLC notified DEQ of the sale of the Facility to H5 Data Centers and DEQ immediately notified Respondent of the need to transfer permit coverage to the new owner of the Facility. However, as of February 1, 2023 Respondent had not submitted a complete permit transfer application to DEQ. Respondent did not submit a complete application for a new permit registration to DEQ until June 21, 2023. Therefore, Respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation of operating without an ACDP.

"C" is Respondent's efforts to correct or mitigate the violation, and receives a value of -3 according to OAR 340-012-0145(6)(c) because Respondent made reasonable efforts to correct the violation by submitting a complete application for AQGP-018 coverage on June 21, 2023.

"EB" is the approximate dollar value of the benefit gained and the costs avoided or delayed as a result of the Respondent's noncompliance. It is designed to "level the playing field" by taking away any economic advantage the entity gained and to deter potential violators from deciding it is cheaper to violate and pay the penalty than to pay the costs of compliance. In this case, "EB" receives a value of \$0 because DEQ has insufficient information to calculate an economic benefit associated with this violation.

PENALTY CALCULATION: $\text{Penalty} = \text{BP} + [(0.1 \times \text{BP}) \times (\text{P} + \text{H} + \text{O} + \text{M} + \text{C})] + \text{EB}$
= \$2,000 + [(0.1 x \$2,000) x (0 + 0 + 4 + 4 + -3)] + \$0
= \$2,000 + (\$200 x 5) + \$0
= \$2,000 + \$1,000 + \$0
= \$3,000